Volume 46 | Issue 3 Article 7

April 1940

Promissory Estoppel in West Virginia

W. E. N.
West Virginia University College of Law

A. A. A.
West Virginia University College of Law

as they did in part by pouring it out, to drink, to sell, to give away or throw away?"[57] As long as there is the intent to deprive the owner of the goods, it matters little what the motive or reason for the theft be.

J. S. M.

PROMISSORY ESTOPPEL IN WEST VIRGINIA

Ever a shock to the conscience of the newly-fledged law student engaged in a perusal of Professor Williston's *Cases on Contracts* is the decision rendered in *Kirksey v. Kirksey.*[1] Defendant Kirksey promised his widowed sister-in-law, Antillico, that he would provide a home for her and her family. Antillico, relying upon the defendant's promise gave up government land on which she had been living and traveling some sixty miles established a home upon the land so generously proffered by the defendant. At the end of two years defendant Kirksey ordered Antillico to move off the land.

Under the strict common law consideration requirements, as pointed out by the court in the above case, defendant Kirksey's promise would not be binding and could be repudiated at will. Since there had been no "bargained-for-exchange",[2] but only a promise to bestow a mere gratuity, "sister Antillico", who had relied upon the promise to her detriment, was without a remedy.

To avoid the harsh results and patent injustice compelled by a strict adherence to the doctrine of consideration in the *Kirksey* case and in similar cases the common law has in part effected an internal reorganization. One expression of this remedial tendency is found in the *Restatement of Contracts:*

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[3]

It is to be noted that "promissory estoppel", as this curative doctrine is generally termed, applies only to promises; it does not

[57] The dissenting judge argued that *lucri causa* is the civil law equivalent to the common law *animus furandi,* and points out that it has been accepted by several courts as a part of the common law, and that there can be no larceny unless some benefit was expected by the taker.

[1] 8 Ala. 131 (1845).

[2] This term is the essence of Williston's explanation of consideration. See WILLISTON, CONTRACTS (1927) §§ 100, 102 *et seq.*

[3] 1 RESTATEMENT, CONTRACTS (1932) § 90.

give relief for detriment suffered preparatory to the acceptance of an offer.[4] Likewise, promissory estoppel differs from "true" estoppel in that the former looks to promises contemplating future action or forbearance, while the latter is directed only to representations concerning an existing state of facts.

Some courts have frowned upon the whole doctrine of promissory estoppel as an unwarranted derogation of the time-honored rules of consideration.[5] Other courts have boldly cited and applied the tenet stated in the *Restatement*.[6] Still other courts, while not giving express recognition to promissory estoppel, have adopted the spirit and achieved the results flowing therefrom by resorting to such labels as "estoppel",[7] or by laboring to work out a contract with consideration when in fact "bargained for exchange" was not contemplated.[8] In these last jurisdictions the reasoning is motivated by the same stimuli from which promissory estoppel proceeds — a promise with reasonable reliance thereon to the detriment of the promisee with injustice inevitably being perpetrated if the promise should not be enforced.

In no West Virginia case has the decision been placed squarely on the basis of promissory estoppel. The spirit of the doctrine runs through a whole line of cases in which relief has been granted pursuant to the reasoning proper to promissory estoppel. For the sake of convenience these West Virginia cases have been divided and discussed under three headings: (1) parol gifts of land followed by improvements; (2) promises of other benefits inducing action or forbearance; (3) promises not to plead statutory defenses.

1. *Parol Gift of Land Followed By Improvements.* *A*, desirous of starting *P* in life, proposed to him that if he would go on a certain tract, cultivate and improve it, he would convey the land to him. Relying upon this promise, *P* entered and made valuable improvements. Meanwhile, *A* conveyed to *B*. *P* sued for specific performance.[9]

[4] Distinction clearly drawn by Judge Hand in Baird Co. v. Gimbel Bros., 64 F. (2d) 344 (C. C. A. 2d, 1933).

[5] Bibb v. Freeman, 59 Ala. 612 (1877); Beall v. Clark, 71 Ga. 818 (1883); Smith v. Force, 31 Minn. 119, 16 N. W. 704 (1883).

[6] Switzer v. Gertenbach, 122 Ill. App. 26 (1905); Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365 (1898).

[7] Beatty v. Western College, 177 Ill. 280, 52 N. E. 432 (1898); Switzer v. Gertenbach, 122 Ill. App. 26 (1905).

[8] Devecmon v. Shaw, 69 Md. 199, 14 Atl. 464 (1888).

[9] Frame v. Frame, 32 W. Va. 463, 9 S. E. 901 (1889). Specific performance, though, was denied because of laches.

The gift alone, when followed by no improvements, could not be enforced for it was at best a mere gratuity, and the courts held that the Statute of Frauds and the doctrine of consideration presented effective bars.[10] In many of these cases, though, the donee, reasonably relying upon the promised gift, had entered on the land and expended money and labor in improvements. Courts of law, faced on one hand with the injustice resulting from this reasonable reliance upon the promised gift if it were not enforced, and on the other hand by the doctrine of consideration and the Statute of Frauds, were unable to find a just solution to the problem.

Courts of equity being less hampered by these restrictive influences first found a substitute for the missing consideration in the doctrine of "meritorious consideration",[11] but as its limitations were inherent, it was of value in only a small number of cases. In those situations where the donee relying upon the promise made valuable improvements, a more satisfactory solution was found. Specific performance of a promise to give the land in such case has generally been granted on the basis of the "rule" that "parol gifts of land followed by improvements" will be enforced.[12] This doctrine performed the two-fold service of taking the cases out of the Statute of Frauds,[13] and of providing an adequate substitute for the missing consideration.[14]

If, instead of being a promise of a gift, it were a verbal contract of sale, the Statute of Frauds apparently denied all relief.

---

[10] White v. White, 64 W. Va. 30, 60 S. E. 885 (1908).

[11] Marling v. Marling, 9 W. Va. 79 (1876).

[12] Our court, though, has been properly wary of holding that any acts performed would be sufficient, and has set up strict requirements regarding the nature and extent of improvements that must be made. Frame v. Frame, 32 W. Va. 463, 9 S. E. 901 (1889); Harrison v. Harrison, 36 W. Va. 556, 15 S. E. 87 (1892); Crim v. England, 46 W. Va. 480, 33 S. E. 310 (1889); Spurgin v. Spurgin, 47 W. Va. 38. 34 S. E. 750 (1899); Stone v. Hill, 52 W. Va. 63, 43 S. E. 92 (1902); Meadows v. Meadows, 60 W. Va. 34, 53 S. E. 718 (1906); Short v. Patton, 79 W. Va. 179, 90 S. E. 598 (1916); Berry v. Berry, 83 W. Va. 763, 99 S. E. 79 (1919); Moss v. Moss, 88 W. Va. 135, 106 S. E. 429 (1921); Bright v. Channels, 92 W. Va. 93, 114 S. E. 513 (1922); Farrar v. Goodwin, 98 W. Va. 215, 126 S. E. 922 (1925); Sponaugle v. Warner, 98 W. Va. 532, 127 S. E. 403 (1925).

[13] Lorentz v. Lorentz, 14 W. Va. 761 (1879). Courts of equity have taken these cases out of the Statute of Frauds for fear that a strict compliance would result in fraud.

[14] Courts of equity have held that sufficient consideration is present for fear of working an injustice. They hold that whereas in a contract with valuable consideration, mere delivery of actual possession would be sufficient part performance, in a gift there must be present that which takes the place of a valuable consideration, and the substitute for it is found in the expenditure of money or labor on valuable improvements.

But, if in accordance with the agreement, a change of possession had taken place, the vendee would partly have performed his contract and it would be fraud on the part of the vendor if he were allowed to divest the vendee of possession. A strict application of the Statute of Frauds would result in fraud, and, courts of equity looking to the substance and not to the form of the matter were not willing to let this happen. If the change of possession were accompanied by the expenditure of money or labor on the land, all the powers of equity were called into action, for not only would there be fraud by the vendor, from which he would be allowed to profit, but the vendee by his actions had introduced valuable consideration into the transaction. When a *donee* takes possession and expends money or labor, as against the donor he stands on the same footing as a purchaser for valuable consideration, and the Statute of Frauds has no application[15] — the litigation revolving around whether or not the reasonable reliance of the donee is sufficient to supply the missing consideration.

In those cases where a parol promise to convey land is enforced by reason of a change of possession followed by improvements, the court says that the Statute of Frauds has no application after such a change of position has taken place[16] — necessarily implying that the Statute would apply in the absence of these special circumstances.[17] The question arises whether "contract", as prescribed by the statute,[18] contemplated the inclusion of "gift" where no consideration of an orthodox nature is present. The Virginia court has taken the position that the Statute of Frauds does not extend to gifts of land.[19] Since frauds might be perpetrated as readily in the enforcement of parol promises to give land as in alleged parol agreements to convey, the reason for the Statute of Frauds is present to an equal degree in both cases.

It is interesting to note that in discussing these cases, the court does not mention the doctrine of promissory estoppel, but that these cases fit into the rule is obvious. A promise has been made which the promisor could reasonably have foreseen would induce the action that was induced, and there would be injustice if

[15] Frame v. Frame, 32 W. Va. 463, 9 S. E. 901 (1889).
[16] White v. White, 64 W. Va. 30, 60 S. E. 885 (1908); Miller v. Lorentz, 39 W. Va. 160, 19 S. E. 391 (1894).
[17] Note (1930) 37 W. VA. L. Q. 288, 290.
[18] W. VA. CODE (Michie, 1937) c. 36, art. 1, § 3: "No contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the contract or some note or memorandum thereof be in writing. . . . ."
[19] Halsey v. Peters, Ex'r, 79 Va. 60, 69 (1884). Also see Pound, *Consideration in Equity* (1918) 13 ILL. L. REV. 667, 672, 674.

the promise were not enforced. That the difference between the enforcement here and promissory estoppel is largely a matter of terminology is amply illustrated by a comparison with similar situations in other states where the doctrine of promissory estoppel is applied.[20]

2. *Promises of Other Benefits Inducing Acts or Forbearance.* *A* promises *P* a gift of money, and to further evidence his intent gives to *P* a promissory note, no consideration for the note being present. *P* reasonably relying on the promised gift, enters into other negotiations or incurs debts.[21]

That the element, in such a case, that makes the promise enforceable is the action taken in reliance on it is well evidenced by a comparison of cases where relief is denied when no change of position has occurred,[22] and those where it is granted when the promisee has altered his position or forborne to alter it because of his reliance on the promise.[23] The language of the court, while still utterly devoid of a direct or indirect reference to the doctrine of promissory estoppel, is indicative of its motivation.

An interesting deviation from the general trend is found in cases of gratuitous licenses in land which, though action is induced, are held to be revocable. These cases are decided with apparent reluctance by the court. It will be noticed that the decision in such a case is based upon the lack of a deed in conveying the interest.[24] Why the necessity of a deed should be so strenuously adhered to in these cases, and not in cases of a gift of land, is not clear. It can only be noted that this distinction exists.

3. *Promises Not to Plead Statutory Defenses.* *P* has fire insurance with *D*. The policy states that no suit can be sustained unless commenced within six months after the fire. *P* relying upon the promise of *D* to pay the full sum of the policy without suit if *B* will also pay does not sue within the six months. Later *P*, recovering from *B*, sues *D* who has refused to pay. *D* sets up the statutory period as a defense.[25]

In this and similar cases[26] a valid consideration is found to be

[20] Greiner v. Greiner, 131 Kan. 760, 293 Pac. 759 (1930). The Kansas court quotes RESTATEMENT, CONTRACTS § 90.

[21] McKinney v. Rhinehart, 102 W. Va. 531, 135 S. E. 654 (1926).

[22] Banner Window Glass Co. v. Barriat, 85 W. Va. 750, 102 S. E. 726 (1920).

[23] Huff v. Lanes Bottom Bank, 110 W. Va. 389, 158 S. E. 380 (1931).

[24] Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399 (1897). See also Comment (1940) 46 W. VA. L. Q. 263.

[25] Galloway v. Standard Fire Ins. Co., 45 W. Va. 357, 31 S. E. 969 (1898).

[26] Sadler v. Marsden, 160 Va. 392, 168 S. E. 357 (1933); Georgeton v. Reynolds, 161 Va. 164, 170 S. E. 741 (1933).

present in the making of the original contract, but the litigation revolves around the later promise not to plead a statutory bar — a representation of future action, upon which representation the promisee reasonably relies, greatly to his detriment if the promise is not enforced. The cases frequently hold that the promisor has by his actions waived his right, and that since he no longer has it, he can not later attempt to plead it. Others, though, speak more in terms of estoppel.

But regardless of whether the language used is indicative of waiver or estoppel, the stimulus which compels enforcement of the agreement is the unfairness that would result to the promisee who reasonably relied upon a promise not to do an act in the future. It is only in cases in which unfairness would result that it would seem just to compel a fulfillment of the promise, and it is precisely in these cases that the doctrine of promissory estoppel would be applicable.

Conclusion. The courts in West Virginia, in arriving at their decision in cases where no actual consideration is present, but reliance has taken place, often do so on the basis of well-established "rules" of law or equity. In other cases, their decision is based solely upon the inequity of allowing the promisor to escape his promise after action has been induced. The doctrine of promissory estoppel is not mentioned by name, but its application in such cases would result in no different conclusion. The doctrine itself is not new, it is an entity, gathering into its sphere diversified rulings and tenets of the law. It may not be officially law in West Virginia, but its influence is both apparent and desirable, and its adoption inevitable.

W. E. N.
A. A. A.

TRUST INVESTMENTS IN WEST VIRGINIA

Today, the problem of the proper investment of trust funds by fiduciaries arises with much more frequency than formerly. That it is becoming increasingly important is evidenced by the amount of recent legislation dealing with the question. The problem is troublesome both to legislatures and to courts in their attempts to formulate principles which will, as far as possible, not only keep intact the principal of the trust fund, and at the same time secure